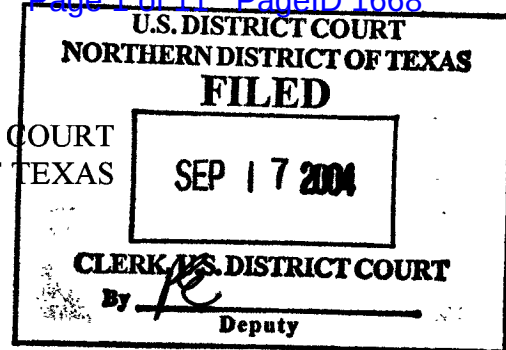


ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



Civil Action No. 3:95-CV-0335-D

VIRGINIA E. SWICEGOOD §  
AS EXECUTRIX OF THE ESTATE OF §  
WILLIAM R. SWICEGOOD, JR., M.D., §

Plaintiff- §  
Counterdefendant, §

MARTI T. DEAN, §

Plaintiff- §  
Intervenor, §

and DAVID GREENSTONE, as §  
RECEIVER FOR MARTI T. DEAN, §

Plaintiff- §  
Intervenor, §

VS. §

THE MEDICAL PROTECTIVE §  
COMPANY, §

Defendant- §  
Counterplaintiff. §

COURT'S CHARGE TO THE JURY

MEMBERS OF THE JURY:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

37           Regardless of any opinion you may have as to what the law is or ought to be, it would be a  
38 violation of your sworn duty to base a verdict upon any view of the law other than that given in these  
39 instructions, just as it would also be a violation of your sworn duty, as judges of the facts, to base a  
40 verdict upon anything other than the evidence in the case.

41           In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as to  
42 any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or  
43 public opinion. The parties and the public expect that you will carefully and impartially consider all  
44 of the evidence in the case, follow the law as stated in these instructions, and reach a just verdict  
45 regardless of the consequences.

46           This case should be considered and decided by you as an action between persons of equal  
47 standing in the community and holding the same or similar stations in life. The law is no respecter  
48 of persons, and all persons, including corporations, stand equal before the law and are to be dealt with  
49 as equals in a court of justice.

50           As stated earlier, it is your duty to determine the facts, and in so doing you must consider only  
51 the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the  
52 witnesses, the exhibits admitted in the record, and the stipulated facts. Stipulated facts must be  
53 regarded as proven facts. The term "evidence" does not include anything that I have instructed you  
54 to disregard.

55           Evidence admitted before you for a limited purpose may not be considered for any purpose  
56 other than the limited purpose for which it was admitted.

57           Remember that any statements, objections, or arguments made by the lawyers are not  
58 evidence in the case. The function of the lawyers is to point out those things that are most significant

59 or most helpful to their side of the case and, in so doing, to call your attention to certain facts or  
60 inferences that might otherwise escape your notice. In the final analysis, however, it is your own  
61 recollection and interpretation of the evidence that controls in the case. What the lawyers say is not  
62 binding upon you. If an attorney's question contained an assertion of fact that the witness did not  
63 adopt, the assertion is not evidence of that fact.

64 You are not bound by any opinion that you might think I have concerning the facts of this  
65 case, and if I have in any way said or done anything that leads you to believe that I have any opinion  
66 about the facts in this case, you are instructed to disregard it. Further, nothing in these instructions  
67 to you is made for the purpose of suggesting or conveying to you an intimation as to what verdict I  
68 think you should find.

69 Although you should consider only the evidence in the case, you are permitted to draw such  
70 reasonable inferences from the testimony and exhibits as you feel are justified in the light of common  
71 experience. In other words, you may make deductions and reach conclusions that reason and  
72 common sense lead you to draw from the facts established by the evidence in the case.

73 You should not be concerned about whether the evidence is direct or circumstantial. "Direct  
74 evidence" exists when the evidence directly establishes the facts that a party asserts to be true, such  
75 as by an eye witness or in a document. "Circumstantial evidence" is proof of a chain of facts and  
76 circumstances that, without going directly to prove the existence of an essential fact, gives rise to a  
77 logical inference that such fact does actually exist. The law makes no distinction between the weight  
78 you may give to either direct or circumstantial evidence.

79 Now, I have said that you must consider all of the evidence. This does not mean, however,  
80 that you must accept all of the evidence as true or accurate.

81 You are the sole judges of the “credibility” or believability of each witness and the weight to  
82 be given to the witness’ testimony. In weighing the testimony of a witness, you should consider the  
83 witness’ relationship to a particular party; the witness’ interest, if any, in the outcome of the case; the  
84 witness’ manner of testifying; the witness’ opportunity to observe or acquire knowledge concerning  
85 the facts about which the witness testified; the witness’ candor, fairness, and intelligence; and the  
86 extent to which the witness’ testimony has been supported or contradicted by other credible evidence.  
87 You may, in short, accept or reject the testimony of any witness, in whole or in part.

88 Also, the weight of the evidence is not necessarily determined by the number of witnesses  
89 testifying as to the existence or nonexistence of any fact. You may find that the testimony of a  
90 smaller number of witnesses as to any fact is more credible than the testimony of a larger number of  
91 witnesses to the contrary.

92 A witness may be “impeached” or discredited by contradictory evidence, by a showing that  
93 the witness testified falsely concerning a material matter, or by evidence that at some other time the  
94 witness said or did something, or failed to say or do something, that is inconsistent with the witness’  
95 present testimony. If you believe that any witness has been so impeached, it is your exclusive  
96 province to give the testimony of that witness such credibility or weight, if any, as you think it  
97 deserves.

98 The rules of evidence provide that if scientific, technical, or other specialized knowledge will  
99 assist the jury to understand the evidence or to determine a fact in issue, a witness qualified as an  
100 expert by knowledge, skill, experience, training, or education may testify and state an opinion  
101 concerning such matters if the testimony is based upon sufficient facts or data, the testimony is the  
102 product of reliable principles and methods, and the witness has applied the principles and methods

103 reliably to the facts in the case.

104       You should consider each expert opinion received in evidence in this case and give it such  
105 weight as you may think it deserves. If you should decide that the opinion of an expert witness is not  
106 based upon sufficient knowledge, skill, experience, training, or education, or if you should conclude  
107 that the reasons given in support of the opinion are not sound, or that the opinion is not based upon  
108 sufficient facts or data, or that the opinion is outweighed by other evidence, or that the opinion is not  
109 the product of reliable principles and methods, or that the witness has not applied the principles and  
110 methods reliably to the facts in the case, then you may disregard the opinion entirely.

111       The party with the burden of proof must meet that burden by a preponderance of the  
112 evidence. A preponderance of the evidence means such evidence as, when considered and compared  
113 with that opposed to it, has more convincing force and produces in your minds a belief that what is  
114 sought to be proved is more likely true than not true. To prove a fact by a “preponderance of the  
115 evidence” merely means to prove that the fact is more likely so than not so.

116       In determining whether any fact in issue has been proved by a preponderance of the evidence,  
117 the jury may consider the testimony of all the witnesses, regardless of who may have called them, and  
118 all the exhibits received in evidence, regardless of who may have produced them.

119       As used in this charge, the term “plaintiffs” means, collectively, plaintiff-counterdefendant  
120 Virginia E. Swicegood, as executrix of the estate of William R. Swicegood, Jr., M.D., plaintiff-  
121 intervenor Marti T. Dean, and plaintiff-intervenor David Greenstone, as receiver for Marti T. Dean.

122       The “Estate” means Virginia E. Swicegood, as executrix of the estate of William R.  
123 Swicegood, Jr., M.D.

124       “Medical Protective” means defendant-counterplaintiff The Medical Protective Company.

125 “Dr. Swicegood” means William R. Swicegood, Jr., M.D., deceased.

126 The “Clinic” means Hull-Swicegood Clinic, P.A.

127 The “Underlying Lawsuit” means *Marti T. Dean v. Virginia E. Swicegood, Independent*  
128 *Executrix of the Estate of William R. Swicegood, Jr., Deceased, Paul G. Hull, M.D., and Hull-*  
129 *Swicegood Clinic, P.A.*, Case No. 94-06195, in the 191st Judicial District Court of Dallas County,  
130 Texas.

131 The “Final Judgment” means the final judgment signed in the Underlying Lawsuit and affirmed  
132 by the Texas Court of Appeals.

133 PERCENTAGE OF COMPENSATORY DAMAGES

134 You must decide what percentage of the compensatory damages awarded in the Final  
135 Judgment in the Underlying Lawsuit (1) are based on professional services that Dr. Swicegood  
136 rendered or that he should have rendered and (2) are not in consequence of Dr. Swicegood’s  
137 performance of a sexual act.

138 “Compensatory damages” mean the damages awarded to Dean in the Final Judgment, in the  
139 amount of \$725,529.80.

140 “Professional services” of a physician are those that arise out of the physician’s specialized  
141 vocation. It is not a professional service merely because it is performed by a physician; instead, it  
142 must be necessary for the physician to use his specialized knowledge or training as a physician.

143 Any compensatory damages awarded in the Final Judgment for damages that Dean suffered  
144 as a result of her romantic/sexual relationship with Dr. Swicegood are not based on “professional  
145 services” that Dr. Swicegood rendered or that he should have rendered. Any compensatory damages

146 awarded in the Final Judgment for damages that Dean suffered as a result of non-sexual-type acts or  
147 omissions within the realm of activities traditionally performed by a physician are based on  
148 “professional services” that Dr. Swicegood rendered or that he should have rendered.

149 A “sexual act” means sexual intercourse, kissing, touching, hugging, or fondling for sexual  
150 gratification, including subjecting another individual to a nonconsensual act undertaken for the  
151 perpetrator’s own sexual gratification.

152 Damages are “in consequence of the performance of a sexual act” if they are proximately  
153 caused by the performance of the act. “Proximate cause” means that cause, which, in a natural and  
154 continuous sequence, produces an event, and without such cause such event would not have  
155 occurred. There may be more than one proximate cause of an event.

156 QUESTION NO. 1:

157 What percentage, if any, of the compensatory damages awarded against the Estate in the Final  
158 Judgment are based on professional services that Dr. Swicegood rendered or that he should have  
159 rendered and are not in consequence of Dr. Swicegood’s performance of a sexual act?

160 Instruction: Plaintiffs have the burden of proving the percentage of  
161 compensatory damages awarded based on professional services that  
162 Dr. Swicegood rendered or that he should have rendered. Medical  
163 Protective has the burden of proving the percentage of compensatory  
164 damages awarded in consequence of Dr. Swicegood’s performance of  
165 a sexual act. Answer by stating a percentage.

166 ANSWER: 100 %

167 QUESTION NO. 2:

168 What percentage, if any, of the compensatory damages awarded against the Clinic in the Final  
169 Judgment are based on professional services that Dr. Swicegood rendered or that he should have  
170 rendered and are not in consequence of Dr. Swicegood's performance of a sexual act?

171 Instruction: Plaintiffs have the burden of proving the percentage of  
172 compensatory damages awarded based on professional services that  
173 Dr. Swicegood rendered or that he should have rendered. Medical  
174 Protective has the burden of proving the percentage of compensatory  
175 damages awarded in consequence of Dr. Swicegood's performance of  
176 a sexual act. Answer by stating a percentage.

177 ANSWER: 100 %

178 Jury Deliberations

179 The fact that I have given you certain instructions in this charge should not be interpreted in  
180 any way as an indication that I believe a particular party should, or should not, prevail in this case.

181 In order to return a verdict your verdict must be unanimous. It is your duty as jurors to  
182 consult one another and to deliberate with a view towards reaching an agreement. Each of you must  
183 decide the case for yourself, but only after an impartial consideration with each other of all the  
184 evidence in the case. In the course of your deliberations, do not hesitate to reexamine your own view  
185 and change your opinion if convinced it is erroneous. Do not, however, surrender your honest  
186 conviction as to the weight or effect of the evidence solely because of the opinion of other jurors or  
187 for the mere purpose of returning a verdict. Remember at all times that you are not partisans. You  
188 are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

189 After I finish reading this charge, you will retire to the jury room. I will send you the exhibits



190 that have been admitted into evidence. You will first select one member of the jury to act as presiding  
191 juror. The presiding juror will preside over your deliberations and will speak on your behalf here in  
192 court.

193 Do not deliberate unless all members of the jury are present in the jury room. In other words,  
194 if one or more of you go to lunch together or are together outside the jury room, do not discuss the  
195 case.

196 When you have reached unanimous agreement as to your verdict, the presiding juror shall fill  
197 in your answers to the questions on a copy of the charge that I will provide to you for this purpose,  
198 shall date and sign the last page of that copy of the charge, and shall notify the court security officer  
199 that you have reached a verdict. The court security officer will then deliver the verdict to me.


200 The court will honor the schedule you set for your deliberations and your requests for breaks  
201 during your deliberations. From time to time I may communicate with you concerning your schedule.  
202 This is done primarily for the purpose of anticipating the court's staffing needs, and is not in any way  
203 intended to suggest that your deliberations should be conducted at a different pace or on a different  
204 schedule.

205 During the trial, the court reporter made a verbatim record of the proceedings. The court  
206 rules do not provide for testimony to be produced for the jury in written form, or for testimony to be  
207 read back to the jury as a general aid in refreshing the jurors' memories. In limited circumstances,  
208 the court may direct the court reporter to read testimony back to the jury in open court. This is done,  
209 however, only when the jury certifies that it disagrees as to the testimony of a particular witness, and  
210 identifies the specific testimony in dispute.

211 If, during your deliberations, you desire to communicate with me, your presiding juror will

212 reduce your message or question to writing, sign it, and pass the note to the court security officer,  
213 who will bring it to my attention. I will then respond as promptly as possible, either in writing or by  
214 asking you to return to the courtroom so that I can address you orally. If you do send a message or  
215 ask a question in which you indicate that you are divided, never state or specify your numerical  
216 division at the time.

217 September 15, 2004.

218   
219 SIDNEY A. FITZWATER  
220 UNITED STATES DISTRICT JUDGE

221 The foregoing is the unanimous verdict of the jury.

222 Dated: 9-17-04

223 Tanya Berkins  
Presiding Juror